

Does The National Do Not Call Registry Protection Apply to Cell Phones? It depends...

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On February 8, 2023, U.S. Magistrate Judge David S. Cayer issued a Memorandum and Recommendation in which he recommended dismissing a Telephone Consumer Protection Act (TCPA) claim on the defendant's motion to dismiss, finding that the National Do Not Call Registry (DNC) only applied to residential phones and not to cell phones.

The underlying suit was filed on June 30, 2022, by Heather Gaker on behalf of herself and all others similarly situated, vs. Q3M INSURANCE SOLUTIONS d/b/a Final Expense Assistant and TZ Insurance Solutions, LLC, Case No. Case 3:22-cv-00296-RJC-SCR (W.D. North Carolina). The Complaint alleged that Gaker used her cell phone primarily for residential purposes and registered her cell phone number on the DNC on November 15, 2019. Gaker's name and phone number were purportedly entered into a sweepstakes in January 2020, after which she began to receive unsolicited telemarketing calls on her cell phone.

Recognizing that the Fourth Circuit has not addressed whether, under Section 227(c) of the TCPA, cell phone owners are considered "residential telephone subscribers," the memorandum observed that "the Courts that have addressed this issue are split as to the TCPA extending to wireless telephone consumers." 2023 WL 2372649, * 2 (citing to *Boger v. Citrix Sys., Inc.*, No. 8:19-cv-01234-PX, 2020 WL 1939702, at *4 (D. Md. Mar. 3, 2020) ("[T]he Complaint does not foreclose that [the plaintiff's] cell phone functioned as a residential telephone number for the purposes of the statute."), and *Cunningham v. Politi*, No. 4:18-cv-362, 2019 WL 2526536, at *4 (E.D. Tex. Apr. 26, 2019) ("Recent courts considering [similar] claims . . . have found [the TCPA] does not encompass . . . cellular phones.")).

Section 227(c) of the TCPA and the corresponding regulations prohibit businesses from placing "telephone solicitation" calls to a "residential telephone subscriber" who has placed her phone number on the DNC. 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c)(2). The Federal Communications Commission interpreted "residential subscribers" to include those who register their cell phone numbers on the DNC. In a 2003 ruling, the FCC concluded that it is applicable to "any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers." See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 F.C.C. Rcd. 14014 (2003). Despite this guidance, Judge Cayer wrote in this case, "[T]he language of the TCPA specifically provides that the regulations implemented pursuant to Subsection 227(c) concern only

‘the need to protect residential telephone subscribers’ privacy rights.’ The Court further states that based on the dictionary definitions of “residential” and Congress’ use of “cellular telephone” elsewhere in the statute, “both the FCC and Congress were aware of the distinction between cellular phones and residential telephone under § 227(c), § 64.1200(c) and (d) purposely protected only ‘residential telephone subscribers.’”

As noted by the Eleventh Circuit, “the findings in the TCPA show a concern for privacy within the sanctity of the home.” *Salcedo v. Hanna*, 936 F.3d 1162, 1168–69 (11th Cir. 2019). Furthering the distinction between residential phones and cell phones, the *Gaker* Court notes that cell phones do not present the same concerns as residential phones; the “mobility and functionality to silence or decline calls alleviate the concerns inherent with a home telephone.” *Gaker*, 2023 WL 2472649 at *3. In short, the *Gaker* Court held that “the authority rests with Congress to amend the TCPA and bring cell phones within its protections.”

The parties went on to brief objections to the Magistrate Judge’s report and recommendation however the matter ultimately on an offer of judgment entered April 26, 2023. Thus, the case law remains split on the issue of whether cell phone subscribers do qualify as “residential telephone subscribers” for the purposes of the DNC. The takeaway here is that in certain jurisdictions, TCPA defendants may still have a viable defense to cell phone DNC violations.

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